In my judgment the appeal should be dismissed and the defendants should have unconditional leave to defend.

Appeal allowed.

Solicitors: *Lewis & Co. & Gill & Tang.*

ABDUL RAHIM v. VALLAPAI SHAIK

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) September 25, 1986 & April 28, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 235 of 1986]

Land Law – Caveat – Conditional agreement to purchase land – Conditions not fulfilled – Land subsequently resold – Whether original purchaser has right to lodge caveat – Application to remove caveat – Whether there is interest in property and serious questions to be tried – Balance of convenience – National Land Code, s. 327.

In this case one K. Abdul Rahim (deceased) was the owner of a piece of land in Kuala Lumpur. He left him surviving 3 sons and 4 daughters as beneficiaries. In 1977 the three sons of the deceased entered into an agreement with one Tajuddin for the sale of the property, subject to their obtaining the consents of the female beneficiaries. It was agreed that the said Tajuddin should pay $5,000 towards the purchase price and the balance of the purchase price ($295,000) to be settled by monthly payments of $5,000 to the United Asian Bank towards the discharge of the charge against the land. The said Tajuddin paid the initial $5,000 and also paid one instalment of $5,000 to the said bank but thereafter defaulted in all the monthly instalments. The female beneficiaries refused to give their consents. Subsequently the appellant (the attorney for 4 of the beneficiaries) obtained letters of administration to the estate of K. Abdul Rahim (deceased) and entered into an agreement for the sale of the land to one Soo Seng Co. Sdn. Bhd. for an agreed purchase price of $1.5 million. The respondent who was the attorney of Tajuddin thereupon lodged a private caveat on the said land to protect his principal's interest. Subsequently the appellant obtained a court order for the sale of the land. The appellant applied for the removal of the caveat. The learned trial judge dismissed the application and the appellant appealed.

Held, allowing the appeal: the 1977 agreement was a conditional agreement but none of the conditions have been fulfilled. The court order of sale was a consent order involving the appellant and the six beneficiaries of the estate including the female beneficiaries who had earlier refused their consents to the 1977 agreement.

Case referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

SUPREME COURT.

C.V. Das (*T. Kuhanandan* with him) for the appellant.

M.S. Murthi for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The application in the High Court was under section 327 of the National Land Code 1965 where by Originating Summons dated April 18, 1985, the appellant applied for the removal of Private Caveat Presentation No.2383/84 Jilid 25 Folio 61 on land held under Certificate of Title No. 14860 for Lot No. 75 Section 6, Town of Kuala Lumpur. On May 26, 1986, the learned judge dismissed the application with costs. The learned judge was apparently of the opinion that since a number of issues had been raised relating to the rights and interests of the different parties to the property it would only be right and proper that the caveat should be allowed to remain until the determination of such rights and interests. We disagreed and allowed the appeal. We now state our reasons.

It is necessary to revert briefly to the history of the case. One K. Abdul Rahim @ Abdul Rahim s/o Kadar Batcha died intestate in India on March 25, 1977, leaving behind 3 sons and 4 daughters as beneficiaries who were also resident in India. He left, however, a piece of property situated in this country in the form of the land referred to in the Originating Summons. On September 5, 1977, the three sons of the deceased and another (who claimed to be a beneficiary) entered into a sale and purchase agreement with one Tajuddin s/o Md. Kassim as purchaser whereby they agreed to sell not only their six-tenths interests as beneficiaries in the property but also the remaining four-tenths interests of the female beneficiaries subject however to their obtaining the consents of all the female beneficiaries. It was agreed in the agreement that the said Tajuddin s/o Md. Kassim was to pay $5,000 to the vendors towards the purchase price and the balance of the purchase money ($295,000) to be settled by monthly instalments of $5,000 to the United Asian Bank towards the discharge of the charge against the land. The said Tajuddin s/o Md. Kassim paid the initial $5,000 and also paid one instalment of $5,000 to the said bank but thereafter defaulted in all the monthly instalments. The female beneficiaries refused to give their consents. Nothing happened for a few years until

October 15, 1981, when the solicitors for the appellant, acting as attorney for the vendors, gave notice to the said Tajuddin s/o Md. Kassim to rescind the 1977 agreement on grounds of the latter's defaults in the payment of the balance of the purchase money and demanded that vacant possession be delivered within one month from the date of the notice. The said Tajuddin s/o Md. Kassim refused to comply with the notice and has apparently been in possession of the said property up to the present day.

Then the appellant with the limited grant of letters of administration granted to him entered into a sale and purchase agreement in respect of the same land on December 28, 1983, with one Soon Seng Co. Sdn. Bhd. for an agreed purchase price of $1.5 million. Upon being informed of this transaction the respondent acting as attorney for the said Tajuddin s/o Md. Kassim lodged a private caveat on the said land on June 7, 1984, purportedly to protect his principal's interest under the 1977 agreement. On February 6, 1985, the appellant acting as the administrator of the estate of the deceased obtained a court order for the sale of the said land to the said Soon Seng Co. Sdn. Bhd.

Many issues were raised before the learned judge and also before us on appeal. In our opinion for the purpose of the application before the learned judge all that the court need apply is the principle as stated by Lord Diplock in the landmark case of *Eng Mee Yong & Ors.* v. *V. Letchumanan*[1] that in an application under section 327 of the National Land Code the caveator must first satisfy the court that on the evidence presented his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that the balance of convenience is in favour of the *status quo* until the trial of the action.

Here the 1977 agreement was a conditional agreement and as far as the record shows none of the conditions have been fulfilled. The appellant is the attorney for four of the beneficiaries, but he was not an administrator when he entered into the 1977 agreement as attorney for the beneficiaries. He obtained the limited grant of letters of administration on April 12, 1983.

He has obtained the court order dated February 6, 1985, to effect the sale and purchase agreement.

Because of the defaults in the payment of instalments by the said Tajuddin s/o Md. Kassim the amount owed by the estate of the deceased to the Bank was at January 31, 1982, in the sum of $214,281.04.

The court order of sale dated February 6, 1985, was a consent order involving the appellant and the six beneficiaries of the estate including all the four female beneficiaries who had earlier refused their consents to the 1977 agreement.

The appeal was accordingly allowed with costs to the appellant.

Appeal allowed.

Solicitors: *Kam Woon Wah & Co. ; Murthi & Partners.*

CHUNG KHIAW BANK LTD. v. TIO CHEE HING

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) September 25, 1986 & April 28, 1987]

[Kota Kinabalu – Supreme Court Civil Appeal No. 256 of 1985]

Practice and Procedure – Pleadings – Application to strike out writ and statement of claim on grounds that it disclosed no reasonable cause of action or it was vexatious and an abuse of process of court – Matter relied on time-barred – R.H.C. 1980, O.18 r.19.

Limitation – Matter relied on time-barred – Suit brought after 3 years.

The respondent had charged his land to the appellants, the first time prior to 1968 and the second time in August 1968. The appellants registered the first charge on August 14, 1968, and the second charge on August 13, 1968. The respondent alleged that the appellants had fraudulently obtained the first charge. The appellants had obtained judgment against the respondent in 1969 and an order of execution had been made against the respondent. The respondent then brought an action praying for an order that the judgment entered against him be set aside and all execution proceedings be stayed. The appellants then applied to have part of the indorsement of claim struck out and this application was granted by the learned Judge. He also dismissed the application of the respondent to amend the statement of claim to include an allegation of fraud. The respondent subsequently brought an action alleging that the appellants had taken an unfair advantage of his financial difficulties in executing the first and second charges and struck an unconscionable bargain. He therefore claimed the charges were never valid and ought to be cancelled. The appellants applied to strike out the respondent's writ and statement of claim on the grounds that it disclosed no reasonable cause of action or that it was vexatious and an